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(11)

No. 06-7949

In the Supreme Court of the United States

BRIAN MICHAEL GALL,
PETITIONER,

v.

UNITED STATES OF AMERICA,
RESPONDENT.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE NEW YORK COUNCIL OF DEFENSE LAWYERS AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether, when assessing upon appeal the "reasonableness" of a sentence under *United States v. Booker*, 543 U.S. 220 (2005), a circuit court should reverse a district court's reasoned decision to impose a sentence outside the United States Sentencing Guidelines if it concludes the case does not exhibit unique or extraordinary circumstances.

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STATEMENT OF INTEREST

The New York Council of Defense Lawyers ("NYCDL") is a not-for-profit professional association of approximately 200 lawyers (including many former federal prosecutors) whose principal area of practice is the defense of criminal cases in the federal courts of New York.[1] NYCDL's mission includes protecting and ensuring individual rights guaranteed by the U.S. Constitution by rule of law through education; supporting and advancing the criminal defense function by enhancing the quality of defense representation; taking positions on important defense issues; promoting study and research in the criminal justice system; and promoting the proper administration of criminal justice.

NYCDL offers the Court the perspective of very experienced practitioners who regularly handle some of the most complex and significant criminal cases in the federal courts. NYCDL's *amicus* briefs in *United States v. Booker*, 543 U.S. 220 (2005), and *Rita v. United States*, 127 S. Ct. 2456 (2007), were cited by the Court or concurring justices. NYCDL submitted a brief in *Claiborne v. United States*, 127 S. Ct. 2245 (2007), and has an interest in the standards applied on appeal for reviewing sentences that are outside the advisory-guidelines range. NYCDL also has an interest in promoting just and comprehensive sentencing policy that includes alternatives to incarceration. We believe that it is imperative to the protection of our clients' rights, and to the establishment of a more just sentencing system, that the courts of appeals afford sentences imposed outside the advisory-guidelines range and sentences of probation the same degree of deference as sentences of imprisonment within the guidelines range.

To assist this Court, NYCDL has updated its analysis

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[1] Petitioner has filed a general consent for amicus briefs in this case, and a letter of consent from Respondent has been submitted concurrently with this filing. No counsel for a party authored this brief in whole or in part, and no person other than the *amici*, their members, and their counsel made a monetary contribution to the preparation or submission of this brief. S. Ct. R. 37.6.

(submitted in *Rita* and *Claiborne*) of post-*Booker* reasonableness review cases in the Eighth Circuit. This analysis includes cases captured by the search terms described in the attached appendix ("App."),[2] from January 1, 2006 through June 30, 2007. The results show that proportionality review is applied unevenly by the courts of appeals, and particularly the Eighth Circuit. As a result, the vast majority of below-guidelines sentences—especially sentences that do not include incarceration—have been reversed as unreasonable, whereas courts have accorded undue deference to above-guidelines sentences that are substantially higher than what the guidelines advise. These findings cannot be reconciled with the Sentencing Reform Act ("SRA") or this Court's decisions in *Booker* and *Rita*.

SUMMARY OF ARGUMENT

Congress has instructed district courts to "impose a sentence sufficient, but not greater than necessary, to comply with" the purposes of sentencing set forth in the SRA. 18 U.S.C. § 3553(a)(2). District courts must "consider" seven specified factors, one of which is the guidelines range. Although a court of appeals may presume a guidelines sentence to be "reasonable," it may not presume a non-guidelines sentence to be unreasonable. *Rita*, 127 S. Ct. at 2467. Reasonableness review, this Court explained, "merely asks whether the trial court abused its discretion." *Id.* at 2465. "[A]ppellate courts must review sentences individually and deferentially whether they are inside the Guidelines range ... or outside that range," *id.* at 2474 (Stevens, J., concurring), and "appellate judges must still *always* defer to the sentencing judge's individualized sentencing determination," *id.* at 2472 (Stevens, J., concurring) (emphasis added).

First, proportionality review, particularly as applied by the Eighth Circuit, is not faithful to the principles articulated by this Court in *Booker* and *Rita*. The problems

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[2] NYCDL's "Summary of Findings," that was submitted in *Rita* and *Claiborne*, is reproduced in the attached appendix at 2a-8a.

with proportionality review are manifold: its precise meaning, reach and application are hard to define, and it risks affording the guidelines a centrality that belies their present status as "effectively advisory." *See, e.g.*, Tr. of Oral Argument at 34-35, *United States v. Claiborne*, 127 S. Ct. 2245 (2007) (No. 06-5618) (Justice Breyer: "[Proportionality] sounds nice, as if you're saying something, but proportional to what? ... One problem, of course, is that the chart in the guidelines is written on a logarithmic scale .... It doesn't actually work, I don't think, proportionality review, because it's so hard to say what's proportional."). And, contrary to this Court's instructions, the Eighth Circuit and other courts of appeals have applied proportionality review in an uneven manner reflecting a bias in favor of high, above-guidelines sentences, and against below-guidelines sentences, especially probation.

Second, proportionality review has created a capricious and inappropriate judicially-invented line between incarceration and sentences to probation. When the guidelines recommend some imprisonment, and a district court imposes a sentence of probation, the courts of appeals have considered the sentence a "100% variance" from the advisory-guidelines range, and thus essentially treat probation as *zero* punishment. Consequently, the courts of appeals have required probation sentences to be justified by the most extraordinary circumstances. The result is that in a number of cases appellate courts improperly substitute their judgment for that of the district court, ignore the district court's assessment that probation is the appropriate sentence, and effectively mandate incarceration.

By characterizing any probation sentence as a 100% variance, the courts of appeals have severely curtailed probation as a viable sentencing option whenever the advisory guidelines recommend any term of incarceration. This circuit policy toward probation sentences undermines the statutory framework set forth in the SRA. By designating probation as an independent sentencing option under 18 U.S.C. § 3551(b), Congress made clear that there is

a distinct place and purpose for probation and rejected the notion that a sentence of probation is not punishment. Congress provided district courts additional guidance on the permissible use of probation by carving out the offenses for which probation is available. 18 U.S.C. § 3561. Moreover, Congress expressly identified rehabilitation as one of the four purposes of sentencing, § 3553(a)(2)(D), and emphasized the general "inappropriateness of imposing a sentence to a term of imprisonment for the purpose of rehabilitating" defendants. *See* 28 U.S.C. § 994(k). And, at sentencing, Congress directed sentencing courts to "consider" "the kinds of sentences available." 18 U.S.C. § 3553(a)(3).

This statutory structure simply reflects that probation and other "kinds of sentences" have been essential to the federal criminal justice system since at least the 1830s. The availability and evolution of probation reflects society's judgment that in some cases the benefits to the offender and to the public will be greater if the defendant is not incarcerated. Balancing the sometimes competing sentencing purposes and considering the "kinds of sentences available" are tasks uniquely suited for district judges who encounter first-hand the "'multifarious, fleeting, special, narrow facts'" about individual offenses and offenders. *Koon v. United States*, 518 U.S. 81, 99 (1996) (citation omitted). The courts of appeals' second-guessing of district courts' attempts to tailor the punishment to the offender, and their treatment of probation sentences as 100% variances and non-punishment contravene the SRA and the sound sentencing policies that animate it.

Third, the importance of sentencing alternatives cannot be overstated for some offenders. There is substantial evidence that probation sentences for first-time non-violent offenders, particularly the least culpable drug offenders and white-collar defendants, can be sufficient but not greater than necessary to comply with the statutory purposes of sentencing. To fulfill congressional sentencing mandates, district courts must be afforded the discretion, pursuant to *Booker* and *Rita*, to consider "the kinds of sentences

available," including probation, when in the judge's reasoned opinion, that is the appropriate sentence. Proportionality review prevents this and flouts *Booker* and *Rita*.

ARGUMENT

I. PROPORTIONALITY REVIEW HAS BEEN APPLIED INCONSISTENTLY, TO THE DETRIMENT OF DEFENDANTS RECEIVING PROBATIONARY SENTENCES

In its *Claiborne* brief, NYCDL argued that proportionality review is inconsistent with § 3553(a) and this Court's decisions. *See* Brief of New York Council of Defense Lawyers as Amicus Curiae in Support of Petitioner, *Claiborne v. United States*, 127 S. Ct. 2245 (2006) (No. 06-5618). And in this case, Gall (and other *amici*) do an excellent job explaining why. As applied, proportionality review puts undue weight on the guidelines even though they are merely advisory, and undermines the sentencing standards set forth in *Booker* and *Rita*. The way the Eighth Circuit in particular has applied proportionality review impedes district courts' ability to vary from the guidelines consistent with their discretion, which *Booker* and *Rita* recognize is essential to avoid the Sixth Amendment difficulties created by mandatory guidelines.

NYCDL's previous study of reasonableness review outcomes demonstrated that the courts of appeals were uniformly affirming all within-guidelines sentences. App. 2a-8a.[3] NYCDL's study also revealed that in practice sentences *outside* the guidelines range are treated differently on appeal depending upon whether they exceed the applicable range or are below that range. As Justice Scalia has stated, "reasonableness review should not function as a one-way ratchet." *Rita*, 127 S. Ct. at 2477 n.2 However, even though the circuit courts purport to treat all

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[3] As Justice Scalia recognized in his *Rita* opinion, NYCDL's findings reveal that even circuits claiming not to apply a presumption of reasonableness are just as likely as those that do to affirm all within-guidelines sentences. 127 S. Ct. at 2478 n.3 (Scalia, J., concurring).

non-guidelines sentences the same way,[4] in practice they do apply a "one-way ratchet." The courts have shown extraordinary deference to above-guidelines sentences, affirming even sentences requiring defendants to serve double or triple the time suggested by the guidelines. But these same courts of appeals have been hostile to below-guidelines sentences, reversing sentences that shaved only a few months off the bottom of the guidelines range. NYCDL's data revealed that through November 16, 2006, the courts of appeals had reversed only 7 of 154 above-guidelines sentences as unduly harsh. App. at 2a. In stark contrast, however, the courts had declared unreasonably lenient 60 of 71 below-guidelines sentences. *Id.*

The Eighth Circuit pattern was particularly uneven. For the 18 months from January 1, 2006 through June 30, 2007 (updated from the initial study), NYCDL uncovered 38 above-guidelines sentences reviewed by the Eighth Circuit. App. 1a. The court affirmed 36 of these sentences, finding only 2 sentences unreasonably harsh. *Id.* By contrast, the Eighth Circuit reversed 47 of 50 below-guidelines sentences appealed by the government, finding them unreasonably lenient. *Id.*

The Eighth Circuit's government bias impacts its assessment of the extent of variances as well: the court has affirmed 25 sentences that imposed prison terms at least 50% greater than the bottom of the guidelines range, including 14 sentences in which the bottom was *more than doubled*.[5] In at least 11 cases, the Eighth Circuit affirmed

[4] *See, e.g., United States v. Jones*, 460 F.3d 191, 196 (2d Cir. 2006) ("If we are to be deferential when the Government persuades a district judge to render a non-Guidelines sentence somewhat above the Guidelines range, we must be similarly deferential when a defendant persuades a district judge to render a non-Guidelines sentence somewhat below the Guidelines range. Obviously, the discretion that *Booker* accords sentencing judges to impose non-Guidelines sentences cannot be an escalator that only goes up."); *United States v. Anderson*, 2007 WL 1112666, at *2 (5th Cir. 2007) (same).

[5] *See United States v. Lyons*, 450 F.3d 834 (8th Cir. 2006) (from 70 to 180 months); *United States v. Mallory*, 192 Fed. Appx. 586 (8th Cir. 2006)

sentences that added 5 years or more of imprisonment to the bottom of the guidelines range.[6] On the other hand, that court has declared unreasonable nearly every downward variance appealed by the government, requiring, but not finding, extraordinary circumstances to justify the district court's decision. App. 1a.

The Eighth Circuit has even employed the same factor—criminal history—inconsistently. It has approved

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(from 27 to 60 months); *United States v. Maurstad*, 454 F.3d 787 (8th Cir. 2006) (from 41 to 120 months); *United States v. Meyer*, 452 F.3d 998 (8th Cir. 2006) (from 180 to 270 months); *United States v. Porter*, 439 F.3d 845 (8th Cir. 2006) (from 57 to 120 months); *United States v. Sitting Bear*, 436 F.3d 929 (8th Cir. 2006) (from 151 to 228 months); *United States v. Marshall*, 436 F.3d 929 (8th Cir. 2006) (from 151 to 228 months); *United States v. Larrabee*, 436 F.3d 890 (8th Cir. 2006) (from 188 to 363 months); *United States v. Nelson*, 453 F.3d 1004 (8th Cir. 2006) (from 4 to 24 months); *United States v. Chase*, 451 F.3d 474 (8th Cir. 2006) (from 57 to 96 months); *United States v. Mack*, 452 F.3d 744 (8th Cir. 2006) (from 30 to 51 months); *United States v. Hacker*, 450 F.3d 808 (8th Cir. 2006) (from 92 to 180 months); *United States v. Porchia*, 180 Fed. Appx. 598 (8th Cir. 2006) (from 6 to 24 months); *United States v. Larison*, 432 F.3d 921 (8th Cir. 2006) (from 5 to 60 months); *United States v. Hawk Wing*, 433 F.3d 622 (8th Cir. 2006) (from 6 to 18 months); *United States v. Herman*, 206 Fed. Appx. 616 (8th Cir. 2006) (from 30 to 45 months); *United States v. Howard*, 2006 WL 3333024 (8th Cir. 2006) (from 77 to 120 months); *United States v. Nading*, 2007 WL 1544424 (8th Cir. 2007) (from 7 to 24 months); *United States v. Jetter*, 2007 WL 1120420 (8th Cir. 2007) (from 5 to 54 months); *United States v. Miller*, 479 F.3d 984 (8th Cir. 2007) (from 18 to 60 months); *United States v. Baker*, -- F.3d --, 2007 WL 1757825 (8th Cir. 2007) (from 4 to 48 months); *United States v. Red Feather*, 479 F.3d 584 (8th Cir. 2007) (from 5 to 30 months); *United States v. Gnavi*, 474 F.3d 532 (8th Cir. 2007) (from 63 to 120 months); *United States v. Tjaden*, 473 F.3d 877 (8th Cir. 2007) (from 41 to 72 months); *United States v. D'Andrea*, 473 F.3d 859 (8th Cir. 2007) (from 78 to 180 months).

[6] *Lyons*, 450 F.3d 834 (increase of more than 9 years); *Maurstad*, 454 F.3d 787 (increase of 6.5 years); *Meyer*, 452 F.3d 998 (increase of 7.5 years); *Porter*, 439 F.3d 845 (increase of 5.25 years); *United States v. Hawkman*, 438 F.3d 879 (8th Cir. 2006) (increase of 5.5 years); *Sitting Bear*, 436 F.3d 929 (increase of 6.4 years); *Marshall*, 436 F.3d 929 (increase of 6.4 years); *Larrabee*, 436 F.3d 890 (increase of 14.5 years); *Hacker*, 450 F.3d 808 (increase of 7.3 years); *United States v. Garnette*, 474 F.3d 1057 (8th Cir. 2007) (increase of 6.25 years); *D'Andrea*, 473 F.3d 859 (increase of 8.5 years).

substantial *upward* variances in a large number of cases where the district court found that the guidelines did not adequately capture the severity of the offender's criminal history. At the same time, the court has held unreasonable a significant number of below-guidelines sentences in which the district court concluded that the guidelines overstated the offender's criminal history.[7] Though the government might assert that proportionality review can protect defendants' interests and enhances sentencing uniformity, the actual results of appellate review tell a very different story. The Eighth Circuit and other courts of appeals plainly invoke proportionality review to cast a disparaging eye upon below-guidelines sentences even while they afford district judges almost unlimited discretion to increase sentences based on judicial fact-finding to a level often far beyond what even the guidelines recommend. To ensure principled and practical sentencing doctrines that effectuate congressional statutory and policy goals, this Court should reject proportionality review and re-emphasize that the abuse of discretion standard of reasonableness review applies across the board to below-guidelines sentences including sentences of probation.

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[7] *Compare Lyons*, 450 F.3d 834 (affirming upward variance from 70 to 180 months based on criminal history and likelihood of recidivism); *Mallory*, 192 Fed. Appx. 586 (same; from 27 to 60 months); *Maurstad*, 454 F.3d 787 (same; from 41 to 120 months); *Porter*, 439 F.3d 845 (same; from 57 to 120 months); *Chase*, 451 F.3d 474 (same; from 57 to 96 months); *Hacker*, 450 F.3d 808 (same; from 92 to 180 months); *Porchia*, 180 Fed. Appx. 596 (same; from 6 to 24 months); *Hawk Wing*, 433 F.3d 622 (same; from 6 to 18 months), *with United States v. McDonald*, 461 F.3d 948 (8th Cir. 2006) (vacating below-guidelines sentence imposed by district court based on low likelihood of recidivism); *United States v. Ture*, 450 F.3d 352 (8th Cir. 2006) (vacating below-guidelines sentence for first-time offender); *United States v. Gall*, 446 F.3d 884 (8th Cir. 2006)(criminal history); *United States v. Feemster*, 435 F.3d 881 (8th Cir. 2006, (age and criminal history); *United States v. Lee*, 454 F.3d 836 (8th Cir. 2006) (criminal history); *United States v. Bradford*, 447 F.3d 1026 (8th Cir. 2006) (age and criminal history); *United States v. Brinton*, 436 F.3d 871 (8th Cir. 2006) (criminal history).

II. TREATING SENTENCES OF PROBATION AS "100% VARIANCES" IS INCONSISTENT WITH THE SENTENCING REFORM ACT AND IMPROPERLY DISCOURAGES DISTRICT COURTS FROM IMPOSING SENTENCES OF PROBATION IN APPROPRIATE CASES

Booker expressly holds that the "numerous factors" Congress set forth in § 3553(a) are to "guide appellate courts ... in determining whether a sentence is unreasonable." 543 U.S. at 261. However, the Eighth Circuit and other courts of appeals approach what should be a flexible standard of "reasonableness" in an artificially mechanical way, by calculating a percentage by which a sentence varies from the advisory-guidelines range and then purporting to assess the persuasiveness of the district court's reasons against the extent of the variance. This rigid mathematical construct treats sentences of probation as 100% variances from the guidelines. Courts of appeals regard probation sentences essentially as *zero* punishment and as if they are categorically less stringent than any term of incarceration, no matter how brief. That is contrary to Congress's understanding of punishments as expressed in the SRA, is misguided as a matter of law, creates an artificial impediment to effective sentencing policy, and is simply not the courts of appeals' decision to make.

A. Congress Has Provided That Probation Is A Necessary And Effective Sanction In Any Comprehensive Sentencing System

Congress has never suggested that a sentence of probation is a free pass. Both historic sentencing practices and modern sentencing reforms document probation's status as an important type of punishment that must be an integral part of any comprehensive federal sentencing scheme.

In this case, the district judge's detailed written opinion supporting his sentencing determinations document the impact and virtues of probation as a punishment for certain offenders. The district judge fully understood and thoughtfully explained why three years' probation was a

stern sentence that effectuated congressional goals of punishment: "'[P]robation is not an act of leniency. Probation is a substantial restriction of freedom, it is not forgiveness, and it is not an endorsement of the offense.' The Defendant will have to comply with strict reporting conditions along with a three-year regime of alcohol and drug testing. He will not be able to change or make decisions about significant circumstances in his life, such as where to live or work, which are prized liberty interests, without first seeking authorization from his Probation Officer or ... the Court. Of course, the Defendant always faces the harsh consequences that await if he violates the conditions of his probationary term." *United States v. Gall*, 374 F. Supp. 2d 758, 763 (S.D. Iowa 2005) (citation omitted).

Probation, rooted in the common law of England, has been a fixture in the United States since the 1830s. *See* Howard Abadinsky, *Probation and Parole: Theory and Practice* 96 (9th ed. 2006). The concept developed from a deeply-rooted societal notion that punitive alternatives to incarceration may produce greater benefits to society even though incarceration may be appropriate in the ordinary case. "The basis of the probation system is, ... in those cases where an examination of the facts of the case warrant sufficient hope for improvement, to deal with the individual in such a way as to make the best of that hope, on the ground that he is more likely to be a future menace to society if he is [incarcerated] than if he is given an opportunity under supervision to improve ...." Frank W. Grinnell, *The Common Law History of Probation*, 32 J. Crim. L. & Criminology 15, 32 (1941); *see also United States v. Murray*, 275 U.S. 347, 358 (1928) ("Probation is the attempted saving of a man who has taken one wrong step, and whom the judge thinks to be a brand who can be plucked from the burning at the time of the imposition of the sentence"). Probation evolved throughout the 1800s as judges and state legislatures increasingly perceived it as an appropriate sentence for certain offenders. Abadinsky, *supra*, at 96-98. In *Ex parte United States*, however, this

Court held that federal judges lack authority to impose probationary sentences absent congressional authorization. 242 U.S. 27, 52 (1916). Congress signaled its support for probation soon thereafter, authorizing courts to place a convicted offender under the supervision of a probation officer in suspension of a jail sentence. *See* 18 U.S.C. §§ 3651-3656 (1925), *replaced by* 18 U.S.C. §§ 3551-3556.

By 1956, every state and the federal government authorized probationary sentences. Abadinsky, *supra*, at 98. Before the SRA was enacted, district judges had "wide discretion to decide whether the offender should be incarcerated and for how long, whether he should be fined and how much, and whether some lesser restraint, such as probation, should be imposed instead of imprisonment or fine." *Mistretta v. United States*, 488 U.S. 361, 363 (1989); *see also* Frank O. Bowman, III, *Fear of Law: Thoughts on* Fear of Judging *and the State of the Federal Sentencing Guidelines*, 44 St. Louis U. L.J. 299, 312-13 (2000).

Probation continues to be a legitimate and important punishment in the federal criminal justice system and was retained in the SRA as an integral part of a comprehensive federal sentencing system. Congress expressly designated probation as an independent and legitimate form of punishment and sentencing option for district courts to consider. 18 U.S.C. § 3551(b); *see also* Roger W. Haines et al., *Federal Sentencing Guidelines Handbook* § 6A1.1 (2007). Congress provided further direction by specifying the circumstances in which a sentence of probation may be imposed. 18 U.S.C. § 3561. In addition, Congress identified "rehabilitation" as one of the four statutory purposes of sentencing, on equal footing with punishment, deterrence, and incapacitation. 18 U.S.C. § 3553(a)(2); *see also* S. Rep. No. 98-225, at 77 (1983), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3260 ("In setting out the four purposes of sentencing, the Committee has deliberately not shown a preference for one purpose of sentencing over another in the belief that *different purposes may play greater or lesser roles in sentencing for different types of offenses committed by*

different types of defendants.") (emphasis added). Moreover, two of the seven statutory factors Congress instructed district judges to "consider" at sentencing are "the need for the sentence imposed" to achieve the purposes of sentencing and "the kinds of sentences available." 18 U.S.C. § 3553(a)(2)-(3). And the SRA states that "imprisonment is not an appropriate means of promoting correction and rehabilitation." 18 U.S.C. § 3582(a).

The SRA plainly permits judges to consider a variety of sentencing options (including probation) in order to craft a sentence appropriate for the particular offender and circumstances. And Congress directed the Commission to "insure that the guidelines reflect the *general appropriateness of imposing a sentence other than imprisonment in cases in which the defendant is a first offender* who has not been convicted of a crime of violence or an otherwise serious offense." 28 U.S.C. § 994(j) (emphasis added). (Disappointingly, the Commission has never promulgated a specific guideline to effectuate this congressional mandate; this reality makes it that much more important for district judges to have broad authority to impose a sentence other than imprisonment for first offenders even in cases when the guidelines suggest some term of imprisonment.) The statutory directive is clear: the SRA "requires judges to take account of the Guidelines *together with other sentencing goals*," and "to impose sentences that reflect" the statutory purposes of sentencing, including rehabilitation. *Booker*, 543 U.S. at 260; *accord* Richard S. Frase, *Punishment Purposes*, 58 Stan. L. Rev. 67, 82 (2005) (Section 3553(a) "clearly shows that Congress preferred a hybrid theory of sentencing purposes").

The legislative history confirms that Congress intended for probation to play an important role in sentencing. The Senate Report criticized sentencing policies that would "draw an artificial line between imprisonment and probation," and that would "assume[] that a term of imprisonment, no matter how brief, is necessarily a more stringent sentence than a term of probation with restrictive

conditions and a heavy fine." S. Rep. No. 98-225, at 55. "*Such an assumption,*" Congress forcefully concluded, "*would be a roadblock to the development of sensible comprehensive sentencing policy,*" that the SRA seeks to establish. *Id.* (emphasis added).

Congress also directed the Commission to assure that the guidelines, "in recommending a term of imprisonment or length of a term of imprisonment, reflect the general inappropriateness of considering the education, vocational skills, employment record, family ties and responsibilities, and community ties of the defendant." 28 U.S.C. § 994(e). But the Senate Report explained that the purpose of § 994(e) was *not* to exclude these factors from district judges' consideration for all purposes, but rather "to guard against the inappropriate use of incarceration for those defendants who lack education, employment, and stabilizing ties." S. Rep. No. 98-225, at 175. Accordingly, the Senate Report provides that these factors "may play other roles in the sentencing decision; they may, in an appropriate case, *call for the use of a term of probation instead of imprisonment* if conditions of probation can be fashioned that will provide a needed program to the defendant and assure the safety of the community." *Id.* at 174-75 (emphasis added). The Report also points out that "the need for an educational program might call for a sentence of probation if such a sentence were otherwise adequate to meet the purposes of sentencing *even in a case in which the guidelines might otherwise call for a short term of imprisonment.*" *Id.* at 172-73; *see also id.* (discussing how mental or emotional conditions and drug dependence might be considered in determining that a sentence other than imprisonment is appropriate). In sum, the SRA clearly permits—in fact, *requires*—district judges to consider whether probation is an appropriate sentence and gives district courts broad discretion to impose that sentence free from undue second-guessing by appellate judges.

B. Treating All Probation Sentences As 100% Variances Unlawfully Permits Courts Of

Appeals To Substitute Their Judgment For That Of District Judges

NYCDL reviewed a substantial number of appeals of probation sentences, the vast majority of which were reversed as unreasonably lenient. Of 29 appeals of sentences of probation reviewed by NYCDL, the courts of appeals reversed 23 as unreasonably low, and affirmed only 6 sentences.[8] The Eighth Circuit's decisions provide a

[8] *See United States v. Hawkins*, 2007 WL 1241538 (2d Cir. 2007) (where guidelines range was 12-18 months, affirming sentence of 30 months' probation); *United States v. Anderson*, 2007 WL 1112666 (5th Cir. 2007) (where guidelines range was 30-37 months, affirming sentence of 36 months' probation and 8 days time-served); *United States v. Husein*, 478 F.3d 318 (6th Cir. 2007) (where guidelines range was 37-46 months, affirming sentence of 36 months' supervised release and 1 day time-served, including 270 days home confinement); *United States v. Fuson*, 215 Fed. Appx. 468 (6th Cir. 2007) (where guidelines range was 24-30 months, affirming sentence of 60 months' probation, including 6 months' home confinement); *United States v. Menyweather*, 447 F.3d 627 (9th Cir. 2006) (where guidelines range was 21-27 months, affirming sentence of 60 months' probation and 40 days weekend jail time). The courts of appeals vacated as unreasonably lenient the other probation appeals uncovered by NYCDL. *See United States v. Rattoballi*, 452 F.3d 127 (2d Cir. 2006) (where guidelines range was 27-33 months, reversing sentence of 60 months' probation); *United States v. Canova*, 485 F.3d 674 (2d Cir. 2007) (where guidelines range was 57-71 months, reversing sentence of 12 months' probation); *United States v. Kononchuk*, 485 F.3d 199 (3d Cir. 2007) (where guidelines range was 18-24 months, reversing sentence of 60 months' probation); *United States v. Pyles*, 482 F.3d 282 (4th Cir. 2007) (where guidelines range was 63-78 months, reversing sentence of 60 months' probation); *United States v. Hampton*, 441 F.3d 284 (4th Cir. 2006) (where guidelines range was 57-71 months, reversing sentence of 36 months' probation); *United States v. Goldsmith*, 192 Fed. Appx. 261 (5th Cir. 2006) (where guidelines range was 27-33 months, reversing sentence of 36 months' probation, including 12 months' home confinement and three days time served); *United States v. Duhon*, 440 F.3d 711 (5th Cir. 2006) (where guidelines range was 15-21 months, reversing sentence of 60 months' probation, including 6 months' home confinement); *United States v. Davis*, 458 F.3d 491 (6th Cir. 2006) (where guidelines range was 30-37 months, reversing sentence of 36 months' supervised release); *United States v. Wallace*, 458 F.3d 606 (7th Cir. 2006) (where guidelines range was 24-30 months, reversing sentence of 36 months' probation); *United States v. Hildreth*, 485 F.3d 1120 (10th Cir. 2007) (where guidelines range was 27-33 months, reversing sentence of 36 months' probation); *United*

typical example: the court below has reversed 10 of 11 appeals of probation sentences as unreasonably lenient.[9] And in at least two of those cases, it mandated that the district court impose a sentence of imprisonment despite the

States v. Livesay, 146 Fed. Appx. 403 (11th Cir. 2005) (where guidelines range was 78-97 months, reversing sentence of 60 months' probation); *United States v. McVay*, 447 F.3d 1348 (11th Cir. 2006) (where guidelines range was 87-101 months, reversing sentence of 60 months' probation); *United States v. Martin*, 455 F.3d 1227 (11th Cir. 2006) (where guidelines range was 108-135 months, reversing sentence of 24 months' probation). For Eighth Circuit cases, *see* n.9.

[9] *See United States v. Miller*, 484 F.3d 964, 967 (8th Cir. 2007) (vacating sentence of 36 months' probation with 12 months' in-home detention and 8.5 months' pre-trial detention, because "[o]n its face the probationary sentence imposed constituted a 100% downward variance from the Guidelines range"); *Gall*, 446 F.3d 884 ("this amounts to a 100% downward variance, as Gall will not serve any prison time"); *United States v. Likens*, 464 F.3d 823 (8th Cir. 2006) (treating sentence as 100% variance and mandating incarceration); *United States v. Givens*, 443 F.3d 642, 643 (8th Cir. 2006) (where guidelines range was 24-30 months and offense resulted in a loss of greater than $400,000 but less than $1,000,000, holding that sentence of 60 months' supervised release, 12 months' house arrest, eighty hours community service, and restitution of $1.2 million was "wholly unreasonable"); *Ture*, 450 F.3d at 357 (where guidelines range was 12-18 months, reversing sentence of 24 months' probation, stating that probation "amounts to a 100% variance from the Guidelines range," and mandating incarceration); *United States v. Gentile*, 473 F.3d 888, 894 (8th Cir. 2007) (where guidelines range was 37-46 months, reversing sentence of 36 months' probation and 1 day time-served and stating that "[a]lthough there may be circumstances in which probation is appropriate even where the guidelines advise incarceration, this is not such a case"); *United States v. Pool*, 474 F.3d 1127 (8th Cir. 2007) (where guidelines range was 33-41 months, reversing sentence of 60 months' probation); *United States v. Robinson*, 454 F.3d 839 (8th Cir. 2006) (where guidelines range was 63-78 months, reversing sentence of 60 months' probation); *United States v. Medearis*, 451 F.3d 918 (8th Cir. 2006) (where guidelines range was 46-57 months, reversing sentence of "only five years of probation"); *United States v. Rogers*, 400 F.3d 640 (8th Cir. 2005) (where guidelines range was 51-63 months, reversing sentence of 60 months' probation); *United States v. Wadena*, 470 F.3d 735 (8th Cir. 2006) (where guidelines range was 18-24 months, affirming sentence of 60 months' probation where defendant was 67 years old, suffered from several chronic health conditions and underwent 3 hours of dialysis per day and was the sole caretaker for an adopted adult with fetal alcohol syndrome).

district court's belief that a sentence of probation would better serve Congress's purposes of sentencing.

The problems with proportionality review are particularly acute when probation is the sentence because of the way courts "compute" the variance. Courts treat sentences of probation (whenever the guidelines recommend incarceration) as sentences of *zero* punishment and 100% variances from the advisory guidelines range. *See, e.g.*, *United States v. Gall*, 446 F.3d 884, 889 (8th Cir. 2006) ("probation ... amounts to a 100% downward variance"); *United States v. Pyles*, 482 F.3d 282, 289 (4th Cir. 2007) ("a 100% decrease"). This crude approach is inconsistent with Congress's will and fails to accord appropriate deference to district court judgments about how best to effectuate Congress's policies in particular cases.

First, treating sentences of probation as *zero* punishment cannot be squared with the SRA or congressional intent. It assumes that any sentence of incarceration is harsher—and furthers the guidelines' four sentencing purposes better—than a sentence of probation with restrictions on a defendant's liberty. But if that were true, Congress surely would not have authorized probation as a stand-alone sentence. The Senate Report demonstrates that Congress recognized that sometimes probation can be harsher than a short period of incarceration. The Report shows that Congress wanted to avoid "draw[ing] an artificial line between imprisonment and probation" by rejecting a "sentencing policy that assumes that a term of imprisonment, no matter how brief, is necessarily a more stringent sentence than a term of probation with restrictive conditions and a heavy fine." Congress also expressly authorized sentencing courts to impose onerous conditions of probation, such as home confinement, which can make probation sentences harsher than brief sentences of imprisonment. *See, e.g.*, 18 U.S.C. § 3563(b)(19); *see also United States v. Likens*, 464 F.3d 823, 827 (8th Cir. 2006) (Bright, J., dissenting) ("The majority's opinion reads as if ... probation essentially would leave him unpunished. This

is hardly the case; three years' probation would still serve to significantly curtail Mr. Likens's mobility, activities, drug-use, and personal freedom while sparing the citizens of this country the expense of incarcerating a person in poor health who is no danger to society."). As the Senate Report explains, assuming that imprisonment is always a tougher sentence "would be a roadblock to the development of sensible comprehensive sentencing policy." S. Rep. No. 98-225, at 55. Characterizing probation as a 100% downward variance, as the courts of appeals have done, draws the artificial line Congress tried to avoid, and erects precisely the roadblock to sensible sentencing that Congress rejected.

As many courts and judges have long recognized, "[i]ncarceration is not the only, and indeed not even always the best, means of punishing or deterring crime." *Likens*, 464 F.3d at 827 (Bright, J., dissenting); *see also United States v. Blake*, 89 F. Supp. 2d 328, 344 (E.D.N.Y. 2000) ("Instead of reforming its inmates, too often prison converts them into 'hardened enem[ies] of society.'") (citation omitted) (alteration in original). Nevertheless, courts of appeals have described sentences of probation as "a get-out-of-jail-free card," *Pyles*, 482 F.3d at 292, and "setting [the defendant] free," *United States v. Hawkins*, 2007 WL 1241538, at *3 (2d Cir. 2007) (Wallace, J., dissenting).[10] The courts of appeals refuse to accept that probation sentences

[10] Notably, in cases where the district court sentences an offender to probation, the government often "essentially argues ... that any variance from a Guidelines sentencing range of imprisonment down to probation is unreasonable." *Wadena*, 470 F.3d at 738. However, the President has recently articulated a much different and much sounder view of sentencing realities. In commuting entirely the prison sentence of I. Lewis Libby, President Bush stated that the sentence set at the bottom of the calculated guidelines range was "excessive." Defending his commutation, President Bush indicated that the remaining sentence of two-years' probation left in place a "harsh punishment" with "consequences ... long-lasting." *See* Statement of President George W. Bush (July 2, 2007); *cf.* President George W. Bush, State of the Union Address (2004) (stressing the importance of showing compassion and providing job training and placement services to convicted offenders because "America is the land of second chance").

can be reasonable and have failed to appreciate that, by providing probation as an "available" sentence under 18 U.S.C. §§ 3551 and 3561, and requiring district courts to consider "the kinds of sentences available," 18 U.S.C. § 3553(a)(3), Congress conferred on district courts ample discretion to sentence defendants to probation in a variety of cases.

Second, whether probation is more appropriate than incarceration for a particular defendant is a decision best left to the district court. To reach that decision, "the district court must make a refined assessment of the many facts bearing on the outcome, informed by its vantage point and day-to-day experience in criminal sentencing." *Koon*, 518 U.S. at 98. Unlike Congress, which is responsible for establishing sentencing policy, and district courts, which "have an institutional advantage over appellate courts in making [sentencing] determinations, especially as they see so many more Guidelines cases than appellate courts do," *id.*, appellate courts have neither the authority nor the expertise to make refined assessments about the uniqueness of a particular case and whether probation is appropriate. *See also id.* at 99 (noting district courts' "'special competence ... about the ordinariness or unusualness of a particular case'") (citation omitted). A sentence that emphasizes the defendant's potential for rehabilitation is arguably in tension with a pure retributive focus. But any judicially created sentencing doctrines that place undue emphasis on retribution is too blunt an instrument to accommodate the full array of Congress's goals set forth in the SRA. How to accommodate Congress's sometimes competing punishment goals—none of which is formally accorded more weight than any other in the SRA's text—for a particular defendant is a decision best left to the district court. *Rita*, 127 S. Ct. at 2464 ("[D]ifferent judges (and others) can differ as to how best to reconcile the disparate ends of punishment."); *Medearis*, 451 F.3d at 922 (Lay, J., dissenting) ("Sentencing courts have the unique ability to appraise the evidence and personally assess a defendant.").

Thus, in a particular case, a judge may determine that probation is more effective in satisfying Congress's sentencing goals, including deterrence, than retribution for its own sake.

The Eighth Circuit's decision in *Likens* is a prime example of appellate overreaching. The district court calculated a guidelines range of 15-21 months' imprisonment, and after a reasoned analysis, imposed a sentence of three years' probation. The district judge "noted that no violence was involved in the offense, that Likens had been married for thirty-one years and had a supportive family, and that he was suffering from diabetes, heart disease, and obvious addictions to alcohol and drugs." *United States v. Likens*, 487 F. Supp. 2d 1046, 1406 (S.D. Iowa 2007). The judge concluded that Likens was not a threat to society and "that his conduct was entirely linked to his substance abuse and mental health problems." *Id.* at 1046-47. He imposed conditions requiring Likens to participate in substance abuse treatment, mental health treatment and counseling, and barred Likens from "patronizing businesses where more than fifty percent of the revenue is derived from the sale of alcohol." *Id.* at 1047. The district court also explained that a sentence of probation would meet the purposes of sentencing and that "'sending a person with congestive heart failure, a close family support system, and in his fifties would promote not respect, but likely derision for the law.'" 464 F.3d at 825 (quoting Sent. Tr. at 18).

On appeal, instead of deferring to the district court's individualized sentencing determination as this Court's decision in *Rita* requires, the court of appeals effectively applied *de novo* review and held: "Our review of the record and the district court's analysis of the § 3553(a) factors does not reveal the existence of the type of extraordinary circumstances necessary to justify such a reduction." 464 F.3d 825. Not appreciating the sentencing judge's reasoned analysis, the Eighth Circuit stated that "the district court failed to consider important factors, gave inappropriate

weight to irrelevant factors, and committed clear errors of judgment with respect to some relevant factors." *Id.* at 825-26. Accordingly, treating the sentence as a 100% variance, the court held: "What we said in an earlier case applies with equal force here: 'The goal of deterrence rings hollow if a prison sentence is not imposed in this case.'" *Id.* at 860 (citation omitted).

The Eighth Circuit's decision in *Gall* similarly exemplifies its disregard for reasoned probation sentences. Here the district court considered the various § 3553(a) factors including the guidelines range. *Gall*, 374 F. Supp. 2d 758. The court emphasized the absence of any aggravating factors and the fact that several *years* prior to the prosecution, Gall voluntarily withdrew from the conspiracy, earned a bachelor's degree, voluntarily sought alcohol and drug treatment, and started a successful business that employs numerous people. *Id.* at 762-63. Gall had a low criminal history score and his post-offense behavior was "exemplary"; for these reasons, the district court found that Gall was unlikely to re-offend and did not pose a threat to society. The court held that probation would be a sufficient punishment because it is "'a substantial restriction of freedom,'" *id.* at 763 (citation omitted), and imprisonment "would be counter effective by depriving society of the contributions of [Gall]" who has become a productive member of society. *Id.*

The district court sentenced Gall to 36 months' probation including specific substance abuse treatment and testing requirements after engaging in exactly the kind of nuanced and reasoned approach to sentencing that the statute requires. The district court's thorough evaluation is an impressive example of the kind of "refined assessment of the many facts bearing on the outcome, informed by its vantage point and day-to-day experience in criminal sentencing," *Koon*, 518 U.S. at 98, which this Court has said is entitled to substantial deference. *Rita*, 127 S. Ct. at 2474 (Stevens, J., concurring). Every aspect of the sentencing was approached with care, solemnity, and compassion, and by

any common understanding was "not unreasonable." The Eighth Circuit's reversal was a prime example of appellate usurpation of the sentencing judge's authority.

In additional cases, the courts of appeals have reversed probation sentences and *required* incarceration. *See, e.g.*, *Ture*, 450 F.3d at 358 ("The goal of deterrence rings hollow if a prison sentence is not imposed in this case."); *Pyles*, 482 F.3d at 292 ("Pyle's crack cocaine distribution offense is a serious crime that *must* be punished by a sentence of imprisonment.") (emphasis added); *United States v. Rattoballi*, 452 F.3d 127, 137 (2d Cir. 2006) ("The court's failure to impose a term of imprisonment was unreasonable."). However, as this Court remarked in *Koon*: "'[I]t is not the role of an appellate court to substitute its judgment for that of the sentencing court as to the appropriateness of a particular sentence.'" 518 U.S. at 97 (citation omitted); *see also* S. Rep. No. 98-225, at 150 ("[T]he discretion of the sentencing judge has a proper place in sentencing and should not be displaced by the discretion of an appellate court"). This Court should put an end to the unlawful, unwise, and widespread practices in the circuits. Judge Bright's dissent in *Likens* got it right: "[T]he district judge determined that probation is right and just given all the circumstances. ... From the cold record before me, I can't say whether Mr. Likens deserves incarceration or not. ... [I]t is a close call—but not ours to make. The sentencing judge exercised his reasoned discretion and, without more, this court should not disturb it." 464 F.3d at 827.

III. DISFAVORING PROBATION IS ESPECIALLY INAPPROPRIATE FOR LOW-LEVEL DRUG OFFENDERS AND WHITE-COLLAR DEFENDANTS

There is ample evidence that guidelines sentences are greater than necessary for low-level drug offenders and white-collar defendants for two principal reasons. *First*, offense levels are calculated by rigid formulas that are widely acknowledged not to correlate with offense severity. For drug offenders, the guidelines place disproportionate

emphasis on drug quantity; for white-collar offenders, loss calculations often lead to guidelines sentences absurd on their face. *Second*, these defendants have low recidivism rates suggesting an appropriate emphasis on rehabilitation. In light of the guidelines flaws, the reproachful manner in which the courts of appeals view downward variances and probation for these defendants is particularly unjustified.

A. Probation Is Often An Appropriate Sentence For Low-Level Drug Offenders

The mechanical application of the guidelines to low-level drug offenders often results in sentences that are greater than necessary. The most important guidelines determinant (though rarely the most sensible) for sentencing of low-level drug offenders is drug type and quantity. U.S. Sentencing Comm'n, *Fifteen Years of Guidelines Sentencing: An Assessment of How Well the Federal Criminal Justice System is Achieving the Goals of Sentencing Reform* 50 (2004) ("Fifteen Year Report") (noting that drug quantity is a "poor proxy for the culpability of low-level offenders"); *id.* at vii (explaining that "the guidelines' Drug Quantity Table[s] fail in some cases to reflect the relative harmfulness of different drugs"). Calculations driven by quantity often result in sentences for low-level offenders that "overlap with defendants who had much more significant roles in the drug scheme" and are more likely to re-offend. *See* Dep't of Justice ("DOJ"), *An Analysis of Non-Violent Drug Offenders With Minimal Criminal Histories* (1994). The Commission has even acknowledged that guidelines calculations for first-time offenders are harsher than necessary because Criminal History Category I overstates the likelihood of recidivism for true first-time offenders and that "sentencing reductions for 'first offenders' are supported by the recidivism data and would recognize their lower re-offending rates." U.S. Sentencing Comm'n, *Measuring Recidivism: The Criminal History Computations of the Federal Sentencing Guidelines* 15 (2004); *see also* U.S. Sentencing Comm'n, *Report to the Congress: Cocaine and Federal Sentencing Policy* (2007).

That quantity is a "poor proxy for the culpability of low-level offenders, who may have contact with significant amounts of drugs, but who do not share in the profits or decision-making," *Fifteen Year Report* 50, is demonstrated by a problem Congress has noted. In 2005, the Public Safety, Sentencing and Incarceration Reform Caucus of the House of Representatives held a briefing on "The Girlfriend Problem: How Sentencing Laws Affect Women and Children." The Committee observed that "[w]omen are the fastest growing group in the ever-expanding prison population," in part based on "drug laws [that] punish not just those who sell drugs, but also a wide range of people who help or associate with those who sell drugs." Because the guidelines focus on quantity, "[w]here a person is charged with conspiracy in a drug crime, sentences often reflect the total amount of drugs possessed or sold by everyone in the operation. As a result, even when they have minimal, if any, involvement in the drug trade, non-violent women with little or no prior criminal history are increasingly captured in the ever widening net cast by the war on drugs. They are often subjected to the same, or in some cases, harsher sentences than the principals in the drug trade at whom the sentencing statutes were aimed." Thus, the Committee found, "[i]n too many cases, women are punished for the act of remaining with a boyfriend or husband engaged in drug activity, who is typically the father of her children. Many of these women have histories of physical and sexual abuse and/or untreated mental illness." *See* Legislative Briefing on "The Girlfriend Problem," *at* http://sentencing.typepad.com/sentencing_law_and_policy/2005/06/legislative_bri.html and internal link (last visited July 24, 2007); *see also United States v. Greer*, 375 F. Supp. 2d 790 (E.D. Wis. 2005) (consider these factors when imposing probation sentence).

Sentencing Commission statistics indicate that fewer than five percent of defendants in drug cases receive straight probation or other intermediate sanctions as alternatives to incarceration. *See Fifteen Year Report* 52.

However, many district and circuit judges have expressed their interest in being able to impose sentences other than incarceration for certain drug and nonviolent offenses. *See* U.S. Sentencing Comm'n, *Survey of Article III Judges* (2003). And in 2001, the then-Commissioner urged an overhaul of the guidelines to allow for alternatives to incarceration for first-time offenders. Michael Edmund O'Neill, *Abraham's Legacy: An Empirical Assessment of (Nearly) First-Time Offenders in the Federal System*, 42 B.C. L. Rev. 291, 295-96 (2001) ("[I]t is doubtless preferable to reintegrate a first-time (or otherwise low-level) offender into the community than to incarcerate that individual. Aside from the capital costs of prison, there are important human costs; namely, stigmatizing the offender in such a way as to impede his ability to become socially productive.").[11]

Better yet, there is substantial evidence that probation and sentencing alternatives work. Studies document it and the experiences of the states cannot be ignored. *See* Michael Tonry, *The Purposes and Functions of Sentencing*, 34 Crime & Just. 1, 5-7, 33-34 (2006) (identifying a consensus that well-targeted treatment programs in many states significantly reduce recidivism). For example, New York

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[11] In addition, the Chairman of the nation's largest association of prosecutors recently emphasized the need for a renewed focus on rehabilitation in combination with incarceration where necessary, and urged Congress to support community diversion programs. *See* Making Communities Safer: Youth Violence & Gang Interventions that Work: Hearing Before the Subcomm. On Crime, Terrorism, and Homeland Security of the H. Comm. On the Judiciary, 110th Cong. (2007) (oral statement of Paul A. Logli, Chairman of the Board of the National District Attorneys Association) ("What helps us make those [prosecutorial] decisions is if we have available to us programs ... that give us alternatives .... I don't need any more laws. I've got all the criminal laws I need .... I don't need any more sanctions, the sentences are plenty tough. I've got all the discretion I need. What I need is ... programs on the street that have staying power and that have credibility and that will work with people that I can refer people to. Because what I do have is the hammer. I have the coercion that might just make that person stick to a program.") (video on file with counsel).

diverts certain non-violent drug offenders to specialized drug courts for continued monitoring by a judge who retains the authority to give positive reinforcement or impose a variety of sanctions (including jail time if necessary). N.Y. State Comm'n on Drugs and the Courts, *Confronting the Cycle of Addiction & Recidivism: A Report to Chief Judge Judith S. Kaye* (2000), *available at* http://www.courts.state.ny.us/reports/addictionrecidivism.shtml (last visited July 24, 2007); *see also United States v. Brennan*, 468 F. Supp. 2d 400, 404 (E.D.N.Y. 2007) (Weinstein, J.) (describing N.Y. drug courts).

Chief Judge Kaye explained that drug courts became necessary because, "'in many of today's cases, the traditional [incarceration] approach yields unsatisfying results.'" *Brennan*, 468 F. Supp. 2d at 404 (quoting Chief Judge Judith S. Kaye, *Making the Case for Hands-On Courts*, Newsweek, Oct. 11, 1999, at 13). Judge Weinstein has noted that "drug treatment courts have demonstrated significant success in helping offenders with substance abuse problems address the issues underlying their criminal behavior so they can turn their lives around." *Id.* at 405. New York courts also operate the acclaimed "Drug Treatment Alternative-to-Prison Program" (DTAP), a program pushed by local prosecutors to divert felony drug offenders from state prison to home-based treatment programs. Kings County District Attorney's Office, DTAP: Drug Treatment Alternative-to-Prison Program, *available at* http://www.brooklynda.org/DTAP/DTAP.htm (last visited July 24, 2007). An independent evaluation by Columbia University, funded by the National Institute on Drug Abuse, found that DTAP participants were 67% less likely to return to prison than non-participants—at half the cost of incarceration. *See* National Center on Addiction and Substance Abuse at Columbia University, White Paper, *Crossing the Bridge: An Evaluation of the Drug Treatment Alternative-to-Prison (DTAP) Program*, at ii (2003), *available at* http://www.casacolumbia.org/Absolutenm/articlefiles/Crossing_the_bridge_March2003.pdf.

The success of alternative programs in New York illustrates the utility of alternatives to incarceration to achieve the purposes of sentencing. In light of the guidelines' unjust focus on drug quantity resulting in Commission-acknowledged sentences that are greater than necessary in many cases, and the states' successful use of sentencing alternatives, district judges ought to be permitted to take note of these results and impose probation where appropriate to "avoid unwarranted disparities among defendants with similar records who have been found guilty of similar conduct." 18 U.S.C. § 3553(a)(6); *see also generally United States v. Clark*, 434 F.3d 684, 687 (4th Cir. 2006) ("[T]he consideration of state sentencing practices [by district courts] is not necessarily impermissible per se."); *Brennan*, 468 F. Supp. 2d at 407 ("Section 3553(a)(6) should be construed as covering disparities in state-federal as well as federal-federal comparative sentencing."). *But see United States v. Jeremiah*, 446 F.3d 805, 807-08 (8th Cir. 2006) (holding that considering federal/state disparities would undermine the uniformity of federal sentences).

Taking account of the states' experiences is eminently sensible not only for Congress and the Commission as it makes basic sentencing policy choices, but also for appellate courts as they assess the reasonableness of sentences imposed by district courts. Indeed, the states' successful use of alternative sentences is especially telling in drug cases because of the similarity of crimes that are prosecuted in state versus federal court. *See* Christine DeMaso, Note, *Advisory Sentencing and the Federalization of Crime: Should Federal Sentencing Judges Consider the Disparity Between State and Federal Sentences Under* Booker*?*, 106 Colum. L. Rev. 2095, 2119 (2006) (noting that the federalization of much criminal law effectively means that a drug offender can be tried in federal or state court (or both).

Even though the Commission's research reveals that guidelines sentences can be excessive for low-level drug offenders and provides empirical support for sentencing reductions (and probationary sentences) for first-time

offenders, the courts of appeals have frequently reversed downward variances to probation for low-level drug offenders as unreasonably lenient. *See, e.g., Pyles*, 482 F.3d 282 (where guidelines range was 63-78 months, vacating sentence of 60 months' probation including six months' home detention as unreasonable); *United States v. Gentile*, 473 F.3d 888 (8th Cir. 2007) (vacating sentence of one day of imprisonment and probation for Criminal History Category I drug offender); *United States v. Miller*, 484 F.3d 964 (8th Cir. 2007) (vacating sentence of 36 months' probation including 12 months' home detention for Criminal History Category I drug offender). This standard detracts from rather than enhances sensible sentencing policy.

B. Proportionality Review Has Taken Away Judges' Discretion In White Collar Cases

Excessive emphasis on the mechanical guidelines calculations, particularly post-Sarbanes-Oxley, has led to extremely harsh sentences for white-collar offenders. For example, at age 63, Bernie Ebbers was sentenced to 25 years, which the Second Circuit noted was "longer than the sentences routinely imposed by many states for violent crimes, including murder, or other serious crimes such as serial child molestation." *United States v. Ebbers*, 458 F.3d 110, 129 (2d Cir. 2006).[12]

These extreme sentences are a result of guidelines calculations that base the offense level for economic crimes on the pecuniary loss resulting from the crime, much like drug quantity for drug offenders. *See Fifteen Year Report* 50. Judge Rakoff has noted the "travesty of justice that sometimes results from the guidelines' fetish with abstract arithmetic, as well as the harm that guidelines calculations

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[12] Other very lengthy white-collar sentences include 15 years for John Rigas, the 80-year-old founder of Adelphia, 20 years for Timothy Rigas, 30 years for Patrick Bennet, and 20 years for Steven Hoffenberg. *See generally* Ellen S. Podgor, *Throwing Away the Key*, 116 Yale L.J. Pocket Part 279 (2007) (noting the long sentences now routinely given to first-time white-collar offenders, including the guidelines sentence of over 24 years' imprisonment for Jeffrey Skilling).

can visit on human beings if not cabined by common sense." *United States v. Adelson*, 441 F. Supp. 2d 506, 512 (S.D.N.Y. 2006); *see also* Ellen S. Podgor, *Throwing Away the Key*, 116 Yale L.J. Pocket Part 279, 280 (Feb. 2007) ("The accused becomes irrelevant in a sentencing world ruled by the cold mathematical calculations found in the sentencing Guidelines.").

As many scholars have documented, loss calculations are often imprecise and subject to manipulation by prosecutors. *See* Peter J. Henning, *White Collar Crime Sentences After Booker: Was the Sentencing of Bernie Ebbers Too Harsh?*, 37 McGeorge L. Rev. 757 (2006) (determination of loss is often the most important factor in applying the guidelines, but the guidelines provide little guidance for the calculation); Stephanos Bibas, *White-Collar Plea Bargaining and Sentencing After* Booker, 47 Wm. & Mary L. Rev. 721, 739-40 (2005) (noting flexibility prosecutors have to manipulate loss amounts to effect sentencing). Guidelines ranges calculated based on speculative and highly contested pecuniary loss estimates now often result in guidelines sentences ranges that even *exceed* the statutory maximum for a given offense. *See, e.g., United States v. Botts*, 135 Fed. Appx. 416, 417-18 (11th Cir. 2005) (PSR loss calculation of $1.4 billion and Criminal History Category I translated to range of 151 to 188 months', triple the 60 month statutory maximum). In *Adelson*, the guidelines calculation for first offender who pleaded guilty to securities fraud was a draconian 85 years' imprisonment. The calculation resulted from the loss calculation's "multiplier effect," that, for a publicly-traded company with millions of shares, "may lead to guideline offense levels that are, quite literally, off the chart." 441 F. Supp. 2d at 509. Indeed, the guidelines recommendation was so absurd that the government, contrary to its normal sentencing practices, did not seriously advocate for a within-guidelines sentence. As Judge Rakoff noted, the guidelines in this area have "so run amok that [the calculations] are patently absurd on their face." *Id.* at 515.

These lengthy sentences are even inconsistent with the Commission's goal to "ensure 'a short but definite period of confinement' for a larger proportion of these 'white collar' cases, both to ensure proportionate punishment and to achieve deterrence." *Fifteen Year Report* 56 (citation omitted). Substantial evidence has emerged since the guidelines were written suggesting that even a short term of imprisonment is often not necessary to achieve the goals of sentencing for some defendants in white-collar cases. For example, studies have shown that the *length* of imprisonment does not have a significant effect on deterrence in the white collar context. *See* A. Mitchell Polinsky & Steven Shavell, *On the Disutility and Discounting of Imprisonment and the Theory of Deterrence*, 28 J. Leg. Stud. 1, 12 (1999) ("the disutility of being in prison at all may be substantial and the stigma and loss of earning power may depend relatively little on the length of imprisonment," suggesting "that less-than-maximal sanctions, combined with relatively high probabilities of apprehension, may be optimal"). The guidelines are not currently functioning properly in the white-collar context judged by the Commission's or Congress's goals.

This evidence suggests that for white-collar defendants who are first-time offenders, probationary and alternative sentences will frequently be sufficient to achieve the purposes of sentencing and ought to remain available for a district judge to consider in appropriate cases, without the concern of likely reversal that has been shown to be inherent in proportionality review. However, as the stark results of reasonableness review demonstrate, the courts of appeals have effectively eliminated alternative sentences in white collar cases from district judges' discretion by treating punishments of probation, fines, and home detention as extreme departures and by requiring extraordinary justifications for such departures (and by comparing those sentences with the amount of loss the government alleges). *See, e.g., United States v. Livesay*, 484 F.3d 1324, 1334 (11th Cir. 2007) (reversing below-guidelines

sentence and pointing to financial "enormity of the crimes"); *United States v. Wallace*, 458 F.3d 606, 614 (7th Cir. 2006) ("[I]t is the fact that the court chose to eliminate any meaningful incarceration [and imposed probation] for a crime that involved $400,000 of intended loss that makes this such an extraordinary choice."). Using this reasoning, courts of appeals have frequently reversed downward variances in white collar cases. In *United States v. Thurston*, for example, the guidelines range was capped by a statutory maximum of 60 months' imprisonment, and the district court first sentenced Thurston to 3 months' incarceration and 24 months' supervised release after downwardly departing from the then-mandatory guidelines. 456 F.3d 211 (1st Cir. 2006). The First Circuit reversed and ordered that the 60-month sentence be imposed. This Court remanded the case in light of *Booker*, and the First Circuit remanded the case for resentencing before a new district judge. The new judge again imposed a sentence of 3 months' incarceration and 24 months' supervised release. The First Circuit again reversed, rejecting the separate conclusions of *two different district judges*. The court ignored the 24 months' supervised release, treated the sentence as an unreasonably lenient 95% variance, and opined that if it were the sentencing court, it would likely sentence at the statutory maximum. The First Circuit remanded with instructions that absent an extraordinary development, a sentence of no less than 36 months' *incarceration* must be imposed. That, unfortunately, is simply another example of appellate review run amok.

CONCLUSION

For these reasons, this Court should reject proportionality review and direct the courts of appeals to review probation sentences using the same deferential abuse of discretion standard applied to other sentencing decisions—whether within or outside the suggested guidelines range.

Respectfully submitted,

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